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In the

Supreme Court of the United States

October Term, 1983

No. 83-328

James Mabry, Commissioner, Arkansas Department of Correction ..... *Petitioner*

V.

George Johnson ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. Petitioner believes a response is warranted to Johnson's argument that the government had exploited a harsher sentence by taking advantage of Johnson's willingness to plead guilty. Respondent's Brief at 14-16. A brief restatement of the facts indicates that, after the initial plea offer was withdrawn October 30, 1972, trial was scheduled for November 8 and a mistrial was declared November 9, 1972. Trial was rescheduled for December 7, 1972 and then continued to February 26, 1973. On that date, Johnson appeared before the trial court and plead guilty to the charge of accessory after a felony murder. A 21 year consecutive sentence was imposed. (App. 10-11)

The transcript of the plea hearing was made part of the record at the hearing on Johnson's habeas corpus petition. (T. 3, Aug. 22, 1979 hearing). At that hearing, Johnson was represented by two defense counsel, Harold Hall and John Achor, both public defenders. Achor advised the trial court that Johnson desired to withdraw his plea of not guilty and enter a plea of guilty to accessory after the fact of first degree murder. (Plea hearing, T. 3) The trial court stated that it understood that Johnson wanted to plead guilty and take 21 years with the sentence to commence at the expiration of the sentence imposed in the burglary count, to which defense counsel Achor agreed. (Plea hearing, 4)

Upon being addressed by the trial court, Johnson stated he was pleading guilty of his own free will and accord. (Plea hearing, 6) Johnson also advised the state prosecuting attorney he was pleading guilty because he was guilty. (Plea hearing, 7) The trial court then imposed a sentence of 21 years to commence at the expiration of the sentence Johnson was then serving. (Plea hearing, 8-9)

In *United States v. Holman*, No. 83-1189 (6th Cir., Mar. 9, 1984) the district court accepted Holman's guilty plea and agreement, but then subsequently rejected the agreement based upon information contained in the presentence report. Holman then plead guilty pursuant to a new plea agreement. The Sixth Circuit Court of Appeals noted that Holman, at the time of his subsequent plea, was aware that his objections to the district court's rejection of the first plea agreement had been heard and dismissed. Holman was further aware that a more lengthy custody sentence could be imposed. In rejecting Holman's request for specific performance of the first plea agreement, the Sixth Circuit determined that Holman's entering into the new agreement fully aware of the possible consequences cured any claim of prejudice from the first proceeding. In so holding, the Sixth Circuit cited *United States v. Mack*, 655 F.2d 843, 848 (8th Cir. 1981). There, under a somewhat factually analogous situation, Mack plead guilty a second time after

the district court had rejected his original plea. It was noted in *Mack* that his objections to the earlier district court ruling had been "fully aired" and rejected, that Mack fully understood the original plea agreement was no longer in effect, and that a harsher sentence could be imposed. 655 F.2d at 848. In rejecting Mack's claim for specific performance of the original plea agreement, the Eighth Circuit Court of Appeals held that the second guilty plea hearing removed any taint of prejudice from the earlier proceeding.

Johnson similarly has suffered no prejudice. Defense counsel and Johnson were both aware the State's offer of 21 years concurrent had been withdrawn. (T. 63, 92, Aug. 22, 1979 hearing) Thereafter, Johnson's case was set for trial three times, one of which resulted in a mistrial. Johnson ultimately entered a plea of guilty. Johnson testified at the habeas hearing that he understood from defense counsel he would "come out better" if he "took" 21 years but that he did not understand that sentence would be consecutively imposed. (T. 96, 99, 103, 104, 106, Aug. 22, 1979 hearing) The district court determined that Johnson's argument that his guilty plea was coerced must be rejected in light of Johnson's alternate but inconsistent argument that he believed he was receiving a 21 year concurrent sentence. (App. 12-14) Moreover, the guilty plea hearing indicates Johnson was completely advised that the 21 year sentence would commence at the expiration of the previously imposed sentence. Thus, the three subsequent trial settings and the second plea hearing removed any taint of prejudice Johnson now claims occurred from the State's withdrawal of the initial plea offer.

2. Respondent states he plead guilty (to a 21 year consecutive sentence) and that he is now free on parole. Respondent contends the case now before this Court may be moot. Respondent's brief at 22. Such contention prompts a brief reply from petitioner.

This Court has held that a state prisoner who has been paroled into the custody of the State Parole Board and is subject to the "custody" of its members may still maintain a habeas corpus action pursuant to 28 U.S.C. § 2254. *Jones v. Cunningham*, 371 U.S. 236 (1963). Moreover, the "collateral consequences" of respondent's conviction cause him to have a "substantial stake in the judgment of conviction" that the cause has not been rendered moot, although independent federal jurisdiction does not attach therefrom. *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968), citing *Fiswick v. United States*, 329 U.S. 211, 222 (1946).

On February 26, 1973, respondent plead guilty to the charge of accessory after a felony murder and was sentenced to serve 21 years consecutive to the previously imposed 21 year sentence, thus resulting in a total of 42 years incarceration. (App. 4, 10-11) Pursuant to Ark. Stat. Ann. § 43-2829 (Repl. 1977, Supp. 1983), convicted persons who committed felonies prior to April 1, 1977, are eligible for release on parole in accordance with eligibility laws in effect at the time the crime was committed. Here the offense was committed in May 1970. See, also, *Easley v. State*, 274 Ark. 215, 623 S.W.2d 189 (1981) (sentencing procedure controlled by statutes in effect on date crime committed); *Davis v. Mabry*, 266 Ark. 487, 585 S.W.2d 949 (1979) (parole law in effect at time crime committed governs if application of latter law would operate to prisoner's disadvantage).

At the time of the offense, persons sentenced to a term of years were required to serve one-third (⅓) of the sentence imposed, with credit for good time allowances. Ark. Stat. Ann. § 43-2807 (c) (Supp. 1969). For purposes of parole eligibility, consecutive sentences were and are considered as a single commitment reflecting the cumulative minimum and maximum time to be served. Ark. Stat. Ann. § 43-2807 (2) (Supp. 1969, Repl. 1977).

In Arkansas, "parole" is defined as "the release of the prisoner to the community by the Board of Pardons and

Paroles prior to the expiration of his term, subject to conditions imposed by said Board and to its supervision." Ark. Stat. Ann. § 43-2801 (b) (Supp. 1969). A person so paroled, remains "in the legal custody of the institution from which he was released, but subject to the orders of the Board." Ark. Stat. Ann. § 43-2808 (Supp. 1969). Present state law contains language identical to the quoted passages. The cited state statutory provisions have been included in an attached Supplemental Appendix.

Information supplied to petitioner indicates that Johnson is subject to being released from the custody of the Arkansas Department of Correction March 17, 2009. This computation of time is based on Johnson's total sentence of 42 years. Petitioner suggests that if the challenged sentence is determined to be 21 years concurrent, Johnson would be subject to being released from custody March 17, 1988.

Relying on *Jones v. Cunningham*, 371 U.S. 236 (1963), the case before the Court is not moot inasmuch as respondent, admittedly on parole, remains in the legal custody of the Arkansas Department of Correction. See also, *Jones v. Mabry*, 476 F.Supp. 311 (E.D. Ark. 1979), *aff'd* 620 F.2d 307 (8th Cir. 1980) (writ of habeas corpus issued regarding prisoner on parole-release). Compare, *Cotton v. Mabry*, 674 F.2d 701 (8th Cir. 1982) (federal court did not have jurisdiction over a petition for writ of habeas corpus filed by Cotton who had served his sentence and was not on parole on basis of "collateral consequences" of conviction alone).

CONCLUSION

For these reasons and those stated in our opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Arkansas law applicable at the time the offenses were committed is set forth as follows:

Ark. Stat. Ann. § 43-2801 (Supp. 1969)

> 43-2801. When used in this Act, unless the context otherwise requires:
>
> * * *
>
> (b) "Parole" is the release of the prisoner to the community by the Board of Pardons and Paroles prior to the expiration of his term, subject to conditions imposed by said Board and to its supervision. When a court or other authority has filed a warrant against the prisoner, said Board may release him on parole to answer the warrant of such court or authority. [Acts 1968 (1st Ex. Sess.), No. 50, § 23, p. 1646.]
>
> * * *

Ark. Stat. Ann. § 43-2802.1 (Supp. 1969)

> 43-2802.1. There is hereby created the State Board of Pardons and Paroles hereinafter referred to as the "Parole Board" to be composed of five (5) members to be appointed by the Governor and confirmed by the Senate.
>
> * * *

Ark. Stat. Ann. § 43-2804 (Supp. 1969)

> 43-2804. The Parole Board shall have the power to determine what persons shall be placed on parole and to fix the time and conditions of such parole. The Parole Board shall conduct open meetings and make public its findings for each eligible candidate for

parole. Inmate interviews may be closed to the public. All policies, rules and regulations regarding parole shall be formulated by the Parole Board. [Acts 1968 (1st Ex. Sess.), No. 50, § 25, p. 1646.]

* * *

Ark. Stat. Ann. § 43-2807 (Supp. 1969)

43-2807. (a) Death Sentence. Individuals under sentence of death shall not be eligible for release on parole.

(b) Life Imprisonment. (1) Individuals sentenced to life imprisonment prior to March 1, 1968, and those sentenced to life imprisonment after the effective date [February 12, 1969] of this Act, shall not be eligible for release on parole unless such sentence is commuted to a term of years by executive clemency. When such life sentence has been commuted to a term of years (in) the individual shall be eligible for release on parole after having served one-third (⅓) of the time to which the life sentence was commuted, with credit for good time allowances.

(2) Individuals sentenced to life imprisonment on and after March 1, 1968 and prior to the effective date [February 12, 1969] of this Act, shall be eligible for release on parole after having served fifteen (15) years of the sentence, with credit for good time allowances not to exceed five (5) years.

(c) Sentence of years. (1) Individuals sentenced to a term of years prior to March 1, 1968 and those sentenced to a term of years after the effective date [February 12, 1969] of this Act, shall be eligible for release on parole after having served one-third (⅓) of the time for which sentenced with credit for good time allowances or one-third (⅓) of the time to which such sentence is commuted by executive clemency, with credit for good time allowances.

(2) Individuals sentenced to a term of years on and after March 1, 1968, and prior to the effective date [February 12, 1969] of this Act, shall be eligible for release on parole at any time, unless a minimum time to be served, consisting of not more than one-third (1/3) of the total time sentenced, is imposed. In the event a minimum time to be served is imposed, the individual shall be eligible for release on parole after serving the minimum time with credit for good time allowances, and commutation by exercise of executive clemency.

Any person under the age of twenty-one (21) years who is first convicted of a felony and committed to the First Offenders Penal Institution or to the Department of Correction for a term of years, shall be eligible for parole at any time, unless a minimum time to be served, consisting of not more than one-third (1/3) of the total time sentenced is imposed. In the event such individual is sentenced to a minimum time to be served, he shall be eligible for release on parole after serving the minimum time prescribed with credit for good time allowances, and commutation by exercise of executive clemency.

For parole eligibility purposes, consecutive sentences by one or more courts, or for one or more counts, shall be considered as a single commitment reflecting the cumulative minimum and maximum time to be served. [Acts 1968 (1st Ex. Sess.), No. 50, § 28, p. 1646; 1969, No. 48, § 1, p. 57; 1969, No. 94, § 1, p. 263.]

Ark. Stat. Ann. § 43-2808 (Supp. 1969)

43-2808. The Parole Board may release on parole any individual eligible under the provisions of Section 28 [§ 43-2807] confined in any correctional institution administered by the State Department of Correction, when in its opinion there is reasonable probability the prisoner can be released without

detriment to the community or himself. All paroles shall issue upon order of the Parole Board, duly adopted.

Before ordering the parole of any prisoner, the Parole Board shall have the prisoner appear before it and shall interview him. The parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when the Parole Board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released, but subject to the orders of the Board. [Acts 1968 (1st Ex. Sess.), No. 50, § 29, p. 1646.]

Ark. Stat. Ann. § 43-2810 (Supp. 1969)

43-2810. At any time during release on parole the Parole Board may issue a warrant for the arrest of a released prisoner for violation of any conditions of release, or a notice to appear to answer a charge of a violation. Such warrant or notice shall be served personally upon the individual. A warrant shall authorize all officers named therein to return the prisoner to the actual custody of the penal institution from which he was paroled, or to any suitable detention facility while awaiting further transfer to said institution. Any parole or probation officer may arrest such prisoner without a warrant, or may deputize any officer with power of arrest to do so by giving him a written statement setting forth that the prisoner has in the judgment of the probation or parole officer violated the conditions of his release. The written statement delivered with the prisoner by the arresting officer to the official in charge of the institution to which the prisoner is brought for detention shall be sufficient warrant for detaining him. After making an arrest, the parole or probation officer shall present to the detaining authorities a

similar statement of circumstances of violation. Pending hearing, as hereinafter provided, upon any charge of violation, the prisoner shall remain incarcerated in the institution.

Upon arrest and detention, the parole or probation officer making the arrest shall immediately notify the Parole Board and shall submit in writing a report showing in what manner the prisoner violated the conditions of release. Thereupon, or upon an arrest by a warrant as herein provided, the Parole Board shall cause the prisoner to be promptly brought before it for a hearing on the violation charged, under such rules and regulations as the Parole Board may adopt. If the violation is established, the Parole Board may continue or revoke the parole, or enter such other order as it may see fit.

A prisoner for whose return a warrant has been issued by the Parole Board shall, if it is found that the warrant cannot be served, be deemed a fugitive from justice. If it shall appear that he has violated the provisions of his release, the Parole Board shall determine whether the time from the issuance of the warrant to the date of his arrest, or any part of it, shall be counted as time served under the sentence. [Acts 1968 (1st Ex. Sess.), No. 50, § 31, p. 1646.]

Ark. Stat. Ann. § 43-2813 (Supp. 1969)

43-2813. Time served shall be deemed to begin on the day sentence is imposed, not on the day a prisoner is received by the Department of Correction and shall continue only during the time or times in which a prisoner is actually confined in a county jail or other local place of lawful confinement or while under the custody and supervision of the Department of Correction; provided, however, that the sentencing judge may in his discretion direct, when he imposes sentence, that time already served by the defendant in jail or other place of detention, shall be credited against the sentence. [Acts 1968 (1st Ex. Sess.), No. 50, § 34, p. 1646.]

Corresponding Arkansas law presently in effect is set forth below:

> Ark. Stat. Ann. § 43-2801 (Repl. 1977) — When used in this Act, unless the context otherwise requires:
>
> * * *
>
> (b) "Parole" is the release of the prisoner to the community by the Board of Pardons and Paroles prior to the expiration of his term, subject to conditions imposed by said Board and to its supervision. When a court or other authority has filed a warrant against the prisoner, said Board may release him on parole to answer the warrant of such court or authority. [Acts. 1968 (1st Ex. Sess.), No. 50, § 23, p. 1646.]

Ark. Stat. Ann. § 43-2808 (Repl. 1977)

> § 43-2808. The Parole Board may release on parole any individual eligible under the provisions of Section 28 [§ 43-2807] confined in any correctional institution administered by the State Department of Correction, when in its opinion there is reasonable probability the prisoner can be released without detriment to the community or himself. All paroles shall issue upon order of the Parole Board, duly adopted.
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> Before ordering the parole of any prisoner, the Parole Board shall have the prisoner appear before it and shall interview him. The parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when the Parole Board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released, but subject to

the orders of the Board. [Acts 1968 (1st Ex. Sess.), No. 50, § 29, p. 1646.]

Ark. Stat. Ann. § 43-2829 (Repl. 1977)

43-2829. A. Persons who committed felonies prior to April 1, 1977, and were convicted and incarcerated for the same, shall be eligible for release on parole in accordance with the parole eligibility law in effect at the time such crime was committed.

* * *

E. For parole eligibility purposes, consecutive sentences by one or more courts, or for one or more counts, shall be considered as a single commitment reflecting the cumulative sentence to be served.

* * *

Ark. Stat. Ann. § 43-2830 (Repl. 1977)

43-2830. It is the purpose and intent of this Act [§§ 43-2828 – 43-2830] to establish the parole eligibility for persons who are convicted of felonies committed on and after April 1, 1977. Nothing in this Act shall be construed to repeal the parole eligibility laws in effect on the date criminal offenses were committed prior to April 1, 1977. [Acts 1977, No. 93, § 3, p. __.]

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